

Fact Sheet

Stormwater Discharges from Construction Activities North Dakota Pollutant Discharge Elimination System (NDPDES) General Permit NDR10-0000

Reissuance

Background

The current general permit for stormwater discharged from construction activity is scheduled to expire on September 30, 2009. The reissued permit will continue to cover stormwater discharges from both construction activity and small construction activity. The permit is intended to fulfill the construction site stormwater regulatory requirements established in the EPA's Stormwater "Phase I" Final Rule published on November 16, 1990 (55 FR47990) and the EPA's Stormwater "Phase II" Final Rule published on December 8, 1999 (64 FR68722). The "Phase II" rule established permit requirements to regulate stormwater discharges from small construction activity.

General permits provide a streamline means to cover a large number of facilities that are subject to the regulations for stormwater discharges from construction activities. In addition, the general permit process places less of an administrative burden on the issuing authority and regulated community than the individual permitting process. The general permits require baseline control practices aimed at minimizing the impact of stormwater discharges on waters of the state. Individual permits or limited applicability permits (i.e. watershed specific or road construction) may be developed to address specific water quality concerns if necessary.

Currently, there are approximately 1600 construction projects or operations covered by the existing permit for stormwater from construction activities. Over the next five years the number covered by the permit is expected to remain relatively constant. During the past five years, the development of related construction stormwater programs by small MS4s regulated under the "Phase II" rule has raised awareness of the permit requirements.

Significant Permit Changes

Under the old permit, multiple small construction projects could be operated by a permittee who obtained coverage specifically for small construction. The multiple site coverage for small construction activity has been removed. With the change the provisions specific conditions for small construction activity have been removed including the annual location record submittal. The change was made in response to objections by EPA regarding the way the coverage was used and an agreement to allow residential builder coverage on a development or subdivision basis. The draft permit includes conditions for the submittal of a single application for a builder's sites within the same subdivision or common plan of development. The changed or added conditions are in: Part I.D.3 – Application process related to builders; Part I.E.2.c – Notice of terminations for residential builders; Part I.F.2 – Transfers involving permittees such as builders and developers.

The Stormwater Pollution Prevention (SWPP) plan contents were revised to include conditions related to Total Maximum Daily Loads (TMDL) and impaired waters. While the old permit required adherence to TMDLs as a condition for permit coverage the requirement was not restated in the SWPP plan description. The additions to the SWPP plan for TMDLs are found in: Part II.C.1 – Identification and location of TMDL water bodies within 2000 feet of the construction site; Part II.C.3 – Incorporating TMDL load allocations for sediment or related parameter into the SWPP plan.

A condition was added to the SWPP plan to identify a person(s) responsible for overseeing the SWPP plan implementation. The plan must identify a person knowledgeable and experienced in the application of erosion and sediment control BMPs who will oversee the implementation of the SWPP plan, and the installation, inspection and maintenance of the erosion and sediment control BMPs before and during construction. The new condition was added in Part II.C.2.a.

Additional guidance on the coordination of SWPP plans during construction was added to the SWPP plan introduction. The SWPP plan may identify more than one permittee and may specify the responsibilities of each permittee by task, area, and/or timing. Permittees may coordinate and prepare more than one SWPP plan to accomplish this. The language was added to Part II.C.

The items listed in the old permit under Additional Terms and Conditions have been moved into the body of the SWPP plan description. Part II.C.2, Operational Controls, now includes conditions for concrete washout and grinding slurry, secondary containment for bulk storage and dewatering. The conditions for construction site dewatering were expanded and are found in Part II.C.2.g.

The post-construction stormwater management section was revised to reference guidelines for post-construction features for pollutant reductions from new development areas. The guidelines describe the magnitude of storm events and runoff volume for planning a water quality component for post-construction controls. The post-construction water quality controls are intended to provide pollutant reductions for the first flush runoff volume. The first flush of runoff from storm events is typically shown to contain the highest pollutant concentrations. The guidelines are outlined in Appendix 2 of the permit.

The permit indicates that copies of the Notice of Intent, coverage letter, SWPP plan, site inspection records, and general permit shall be kept at the site of the construction activity in a field office, trailer, or shed, or in a vehicle or piece of equipment that is on-site during normal working hours. If the site does not have a reasonable on-site location, then the documents must be retained at a readily available alternative location; preferable with the individual responsible for overseeing the implementation of the SWPP plan. The conditions describing the record keeping items was added in Part III.B.

Permit Renewals

Facilities covered under the present permit shall be retained, provided renewal request is made by submitting the renewal form(s) provided by the North Dakota Department of Health (department) or other written request for renewal of permit coverage for an active project. If deemed necessary, the department may require the submittal of a new Notice of Intent.

Discharges Covered

This permit applies to stormwater discharges associated with construction activity and with small construction activity as defined in 40 CFR Part 122.26(b)(14)(x) and (b)(15), respectively. For purposes of the general permit the reference to construction activity includes both “large construction activity” and “small construction activity”.

1. Large construction activity includes clearing, grading and excavation, that disturbs land of equal to or greater than five (5) acres and includes the disturbance of less than five (5) acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five (5) acres or more.
2. Small construction activity includes clearing, grading and excavation, that disturbs land of equal to or greater than one (1) acre, and includes the disturbance of less than one (1) acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five (5) acres.

Stormwater discharges from support activities (e.g., concrete or asphalt batch plants, equipment staging yards, material storage areas, excavated material disposal areas, borrow areas) may be covered by this permit as part of a related construction site. Similar facilities that will serve multiple projects or are commercial in nature must be covered by a different permit. In many cases it will be appropriate for construction support facilities to be covered under general permit NDR32-0000; stormwater discharges from mining, extraction or paving material preparation activities.

There are other types of discharges which also may not be appropriately regulated through this permit and other limitations on what activities this permit can authorize. As such, the following discharges are not eligible for coverage under this permit:

1. Stormwater discharges associated with industrial activity from any source other than construction activities and related support facilities.
2. Post-construction discharges from industrial activity that originate from the site after construction activities have been completed and final stabilization at the site is achieved. Industrial and post-construction stormwater discharges may need to be covered by a separate stormwater permit.
3. The placement of fill into waters of the state requiring local, state, or federal authorizations (such as U.S. Army Corps of Engineers Section 404 permits).
4. This permit does not substitute for obligations under the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), or National Historic Preservation Act (NHPA), it is your responsibility to ensure the project and resulting discharges comply with the respective requirements.
5. Stormwater discharges that the department determines will cause, or have the reasonable potential to cause or contribute to, violations of water quality standards.
6. Discharges to waters for which there is a total maximum daily load (TMDL) allocation for sediment and/or parameters associated with sediment transport are not covered unless you develop a SWPP plan that is consistent with the assumptions, allocations and

requirements in the approved TMDL. If a specific numeric wasteload allocation has been established that would apply to the project's discharges, the permittee(s) must incorporate that allocation into its SWPP plan and implement necessary steps to meet that allocation.

Obtaining Coverage

For operators of new construction activities wishing to obtain coverage, an application should be submitted at least 7 days prior to starting any activity subject to regulation as a stormwater discharge associated with industrial activity. Permit coverage will become effective 7 days after submittal of a complete application unless otherwise notified by the department.

The application requirements for general permits have in the past, and may be more appropriately referred to under NPDES permit regulations, as a Notice of Intent (NOI) to obtain coverage. However, to simplify permit language the department will use the term "application" in place of "Notice of Intent" in reference to the process of obtaining coverage under the general permit. The application may be on a form provided by the department or other form containing the required information. The current NOI form will be acceptable. New forms may be made available in the future to better reflect the application requirements or to coordinate the process with small MS4 construction programs.

Application Contents

A separate application must be submitted for each project meeting the definition of construction activity. The owner or the owner jointly with the operator (usually the general contractor) shall submit a completed application for this permit. The owner is responsible for compliance with all terms and conditions of this permit. The operator has day to day supervision of construction activities and is jointly responsible with the owner for compliance with the permit for construction activities performed.

The application for coverage under the general permit shall contain, at a minimum, the following information:

1. Owner name, mailing address and phone number;
2. Project contact name and phone number
3. Project/site name;
4. Project/site location (street address; section, township, range; or latitude and longitude), county;
5. A brief description of the construction activity;
6. The anticipated starting date and the anticipated completion date for the project;
7. The estimated total area of disturbance in acres;
8. Name of receiving water(s) or the name of the municipal storm sewer system and receiving water(s);
9. Operator name (if co-applicants), mailing address and phone number
10. The signature of the applicant(s), owner (and operator if co-applicants) signed in accordance with NDPDES permit signatory requirements.

A copy of the stormwater pollution prevention plan must be available for review by the department at the time of application. A copy of the Stormwater Pollution Prevention (SWPP) plan must be submitted with the application if the project involves 50 or more acres; or the project will have a discharge point located with 2000 ft of, and flow to, a water body listed as

impaired under section 303(d) of the Federal CWA due to sediment or parameters associated with sediment transport. A copy of the 303(d) List will be maintained on the department's web site.

For residential construction activity occurring within a development or subdivision subject to the permit requirements, coverage may be obtained by the following:

- a. The owner of the lot(s) shall submit one application for all of the owner's construction activity within the development, or
- b. The operator, such as a homebuilder who may represent one or more lot owners, shall submit one application for all of the operator's construction activity within the development.

In addition, for residential construction a SWPP plan must be developed and implemented for the permittee's activities within the development or subdivision.

Notice of Termination (NOT)

Permittees wishing to terminate coverage under this permit must submit a Notice of Termination (NOT) or other written request identifying the facility and the reason why the permit is no longer needed. The NOT must be signed in accordance with the standard NDPDES permit signatory requirements. Compliance with the conditions of this permit is required until a NOT is submitted.

Typically, permittees may only submit a NOT after final stabilization (see definitions in permit) has been achieved on all portions of the site for which the permittee is responsible. In some cases a NOT may be appropriate when another operator/permittee has assumed control over all areas of the site that has not been finally stabilized in accordance transfer provisions of the permit.

For residential construction only, a NOT is not required for each lot that is sold or stabilized. Instead the permittee may modify their SWPP plan to indicate that permit coverage is no longer required for that lot. The SWPP plan should indicate the reason coverage is no longer needed and the date it was achieved. Should a residential construction permittee complete planned building activity in a development and wish to end permit coverage a NOT would need to be submitted. For residential construction, the department will accept NOTs when temporary erosion protection and down gradient perimeter control for individual lots has been completed and the residence has been transferred to the homeowner. In such cases, the permittee must distribute a "homeowner factsheet" to the homeowner to inform the homeowner of the need for, and benefits of, final stabilization.

Transfer of Ownership or Control

When the owner or operator of a construction project changes the new owner/operator must submit a written request for permit transfer/modification within 7 days of assuming control of the site or commencing work on-site, or of the legal transfer, sale or closing on the property. Late submittals will not be rejected; however, the department reserves the right to take enforcement for any unpermitted discharges or permit noncompliance. For stormwater discharges from construction activities where the owner or operator changes, the new owner or operator can implement the original SWPP plan created for the project or develop and implement their own

SWPP plan. Permittee(s) shall ensure either directly or through coordination with other operators that their SWPPP meets all terms and conditions of this permit and that their activities do not interfere with another party's erosion and sediment control practices.

A permit transfer/modification request is not required for the legal transfer, sale or closing on a property between permittees covered by this permit. Examples include the sale of a property parcel from a developer to a builder, or the transfer of an easement from a developer to a local government authority. If the new party is not covered by this permit at the time of transfer or sale, then the new owner/operator must submit a completed application/NOI within 7 days of assuming control of the site.

Stormwater Pollution Prevention Plans

All facilities covered by this general permit are required to prepare, implement, and maintain a Stormwater Pollution Prevention (SWPP) plan. The SWPP plan and revisions are subject to review by the department. The objectives of the plan are to identify potential sources of sediment or other pollution from construction activity and to ensure practices are used to reduce contribution of pollutants from construction site runoff. Stormwater management measures developed under other regulatory programs can be included in the SWPP plan or incorporated by reference. The SWPP plan must also incorporate the design maintenance guidelines included in the permit as Appendix 1, to the extent practicable. The SWPP plan shall include the following information.

1. **Site Description.** Each plan shall provide a description of the construction site and potential pollutant sources as indicated below:
 - a. A description of the overall project and the type of construction activity;
 - b. Estimates of the total area of the site and the total area that is expected to be disturbed by excavation, grading, grubbing, or other activities during the life of the project;
 - c. A proposed timetable of activities that disturb soils for major portions of the site;
 - d. A description of the soil within the disturbed area(s);
 - e. The name of the surface water(s) or municipal storm sewer systems at or near the disturbed area that may receive discharges from the project site; and
 - f. A site map indicating:
 - (1) drainage patterns and approximate slopes anticipated after major grading activities;
 - (2) construction site boundaries and areas of soil disturbance;
 - (3) location of major structural and nonstructural controls identified in the plan;
 - (4) location of areas where stabilization practices are expected to occur;
 - (5) surface waters, including an aerial extent of wetland acreage; and
 - (6) locations where stormwater is discharged to surface water.
 - g. Projects that have a discharge point within 2000 feet of, and flow to, a water body listed as impaired under section 303(d) of the Federal Clean Water Act due to sediment or parameters associated with sediment transport, must identify the water body and impairment in the plan. The department's 303(d) list may be found at the following website under Integrated Reports: www.ndhealth.gov/WQ/SW/A_Publications.htm.

2. **Operational Controls.** The plan shall describe the Best Management Practices (BMPs) used in day to day operations on the project site that reduce the contribution of pollutants in stormwater runoff.
- a. The plan must identify a person knowledgeable and experienced in the application of erosion and sediment control BMPs who will oversee the implementation of the SWPP plan, and the installation, inspection and maintenance of the erosion and sediment control BMPs before and during construction. The owner shall develop a chain of responsibility with all operators on the site to ensure that the SWPP plan will be implemented and stay in effect until the construction project is complete, the entire site has undergone final stabilization, and a NOT has been submitted to the department.
 - b. Good housekeeping practices to maintain a clean and orderly site. Litter, debris, chemicals and parts must be handled properly to minimize the exposure to stormwater. This includes measures to reduce and remove sediment tracked off-site by vehicles or equipment, and the generation of dust.
 - c. Preventative maintenance practices must be provided to ensure the proper operation, inspection and maintenance of stormwater control devices (e.g., oil-water separators, catch basins, and silt fences) and equipment used or stored on site.
 - d. Spill prevention and response procedures must be developed where potential spills can occur. Where appropriate, specific handling procedures, storage requirements, spill containment and cleanup procedures must be identified. Bulk storage structures for petroleum products and other chemicals shall have adequate leak and spill protection to prevent any spilled materials from entering waters of the state, storm sewer systems or draining onto adjacent properties.
 - e. Employee training informs personnel of their responsibility in implementing the practices and controls included in the plan such as spill response, good housekeeping, and sediment control practices. Employee training must be provided at least annually, as new employees are hired or as necessary to ensure compliance with the plan and the general permit.
 - f. Concrete wash water, grindings and slurry, shall not be discharged to waters of the state, storm sewer systems or allowed to drain onto adjacent properties.
 - g. Dewatering or basin draining (e.g., pumped discharges, trench/ditch cuts for drainage) related to the permitted activity must be managed with the appropriate BMPs, such that the discharge does not adversely affect the receiving water or downstream landowners. The following conditions and considerations apply to the dewatering activities:
 - 1) The dewatering is limited to stormwater and groundwater that may collect on site and those sources identified in Part II.A. A separate permit must be obtained to discharge water from other sources such as hydrostatic testing or contaminated groundwater.
 - 2) The permittee(s) must operate the discharge to minimize the release of sediment and provide energy dissipation measures to adequately protect the outlet from erosion. Discharges must not lead to the deposition of sediment within storm water conveyance systems or surface waters. Discharges must not cause or potentially cause a visible plume within a surface water body.

- 3) In addition to the inspection requirements in Part III, the dewatering activities should be inspected daily. The inspection must include the dewatering site, areas where the BMPs are being implemented and the discharge location. A record should be maintained to document the inspections of the dewatering operation and actions taken to correct any problems that may be identified.
 - 4) Local authorities may require specific BMPs for discharges affecting their storm sewer system.
3. **Erosion and Sediment Controls.** An erosion and sediment control plan shall be developed to identify the appropriate control measures and when they will be implemented during the project for each major phase of site activity. The erosion and sediment control plan must conform to the guidelines provided in Appendix 1 of the permit which represents a compilation of regionally applied design and operating standards. The basic elements for erosion and sediment controls are indicated below:
- a. Sediment basins, or an appropriate combination of equivalent sediment controls such as smaller sediment basins, and/or sediment traps, silt fences fiber logs, vegetative buffer strips, berms, etc., are required for all down slope boundaries of the disturbance area and for those side slope boundaries as may be appropriate for site conditions.
 - b. Temporary erosion protection (such as cover crop planting or mulching) or permanent cover must be provided for the exposed soil areas where activities have been completed or temporarily ceased. These areas include graded slopes, pond embankments, ditches, berms and soil stockpiles.
 - c. All control measures must be properly selected, installed, and maintained in accordance with the manufacturer's specifications and good engineering practices. If periodic inspections or other information indicates a control has been used inappropriately, or incorrectly, the permittee must replace or modify the control for site situations. The permittee may deviate from the manufacturer's specifications and erosion and sediment control guidelines in Appendix 1 if they provide justification for the deviation and document the rationale for the deviation in the SWPP plan.
 - d. If sediment escapes from the site, off-site accumulations of sediment must be removed in a manner and at a frequency sufficient to minimize off-site impacts. The plan must be modified to prevent further sediment deposition off-site.
 - e. The stormwater controls are expected to withstand and function properly during precipitation events of up to the 2 year, 24 hour storm event. Visible erosion and/or off-site sediment deposition from such storm events should be minimal. The 2 year, 24 hour rainfall event in North Dakota ranges from about 1.9 inches in the west to 2.3 inches in the east.
 - f. For projects that discharge to waters that have a TMDL allocation for sediment and/or parameters associated with sediment transport (i.e. total suspended solids, turbidity), the plan must be consistent with the assumptions, allocations and requirements of the approved TMDL. If a specific numeric wasteload allocation (WLA) has been established that would apply to the project's discharges, then the WLA must be incorporated into the plan and the necessary steps must be taken to meet the WLA. Information about TMDL allocations may be found at the following website:
www.ndhealth.gov/WQ/SW/Z2_TMDL/default.htm.

4. **Stormwater Management.** The plan shall include a description of practices that will be installed during the construction process to control pollutants in stormwater discharges occurring after construction operations have been completed. Such practices may include:
- a. Stormwater ponds; flow reduction by use of open vegetated swales and natural depressions; infiltration of runoff on-site; and sequential systems which combine several practices. Guidance for pollutant reduction from post-construction stormwater management in new development or redevelopment areas is provided in Appendix 2 of the permit.
 - b. Velocity / energy dissipation devices must be placed at discharge locations. Appropriate erosion protection must be provided for outfall channels and ditches.
 - c. Under this permit, permittees are responsible for maintaining on-site stormwater management features prior to final stabilization and acceptance by the long term operator. The plan should indicate who will provide long term maintenance of the stormwater management features. For stormwater management features that may discharge pollutants from point sources such as industrial sites a separate NDPDES permit may be required.
 - d. When post-construction stormwater management for the site will be provided by a regional system, identify the system and operator in the plan. If the post-construction stormwater management guidelines in Appendix 2 cannot be provided onsite or by a regional system, the plan must include an explanation of the stormwater controls that will be implemented.
5. **Maintenance.** All erosion and sediment control measures and other protective measures identified in the plan must be maintained in effective operating condition. The plan must indicate as appropriate the maintenance or clean out interval for sediment controls. If site inspections, required in this permit, identify BMPs that are not operating effectively, maintenance shall be arranged and accomplished as soon as practicable.
6. **Inspections.** The plan must provide for site inspections to monitor the condition of stormwater discharge outlets and effectiveness of BMPs. The permittee must ensure that personnel conducting site inspections are familiar with permit conditions and the proper installation and operation of control measures. The erosion and sediment control measures identified in the plan shall be observed to ensure that they are operating correctly and in serviceable condition. Inspections shall also include discharge outlets from areas used for storage of materials, permanent stormwater control measures and vehicle maintenance areas. These areas shall be inspected for evidence of, or the potential for, pollutants entering a drainage system. If necessary, the plan shall be revised based on the observations and deficiencies noted during the inspection.

Site inspections on active sites must be conducted least once every 14 calendar days and within 24 hours after any storm event of greater than 0.50 inches of rain per 24-hour period. Reduced inspection frequencies are provided for inactive areas and may be suspended during frozen conditions. The permit also specifies the minimum information that must be recorded for each inspection.

The permit provides for the development of an alternative inspection plan for long, narrow, linear construction projects such as pipeline or utility line inspection, and similar projects in remote areas where vehicle traffic is restricted or could compromise native vegetation or stabilization measures. A copy of the SWPP plan and proposed inspections plan must be

submitted to the department 30 days prior to implementing an alternative inspection plan. Any alternative plan must provide for the timely recognition and repair of erosion and sediment damage.

7. **Plan Review and Revisions.** The plan must be signed in accordance with the permit's signatory requirements, and retained on-site for the duration of activity at the permitted location. The permittee must make plans available upon request to the department, EPA, or, in the case of discharges to a municipal separate storm sewer system, to the operator of the municipal system. The permittee must amend the SWPP plan whenever there is a change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to the waters of the state. The plan must also be amended if the plan is found to be ineffective in controlling pollutants present in stormwater.

Local Requirements

All stormwater discharges must comply with the requirements, policies, or guidelines of municipalities and other local agencies as applicable to the construction site. Any discharges to a storm sewer, ditch or other water course under the jurisdiction of a municipality must comply with any specific conditions or BMPs required by the municipality. The local stormwater requirements may be established by ordinance or stormwater management programs developed to comply with a separate NDPDES permits issued to the municipality.

Final Stabilization

The permittee(s) must ensure final stabilization of the site. The permittee(s) should submit a NOT within 30 days after final stabilization is complete, or another owner/operator (permittee) has assumed control over all areas of the site that have not undergone final stabilization. Final stabilization can be achieved in one of the following ways:

1. All soil disturbing activities at the site have been completed and all soils must be stabilized by a uniform perennial vegetative cover with a density of 70 percent over the entire pervious surface area, or other equivalent means necessary to prevent soil failure under erosive conditions. The following conditions must also be met:
 - a. All drainage ditches, constructed to drain water from the site after construction is complete, must be stabilized to prevent erosion;
 - b. All temporary synthetic, and structural erosion prevention and sediment control BMPs (such as silt fence) must be removed as part of the site final stabilization; and
 - c. The permittee(s) must clean out all sediment from conveyances and from temporary sedimentation basins that will be used as permanent water quality management basins. Sediment must be stabilized to prevent it from being washed back into the basin, conveyances or drainage ways discharging off-site or to surface waters. The cleanout of permanent basins must be sufficient to return the basin to design capacity.
2. For residential construction only, final stabilization has been achieved when temporary erosion protection and down gradient perimeter control for individual lots has been completed and the residence has been transferred to the homeowner. Additionally, the permittee must distribute a "homeowner factsheet" to the homeowner to inform the homeowner of the need for, and benefits of, final stabilization.

Qualifying Local Programs

The phase II stormwater rule provides for the recognition and incorporation by reference of qualifying local programs for erosion and sediment control from construction sites (40CFR122.44(s)). Presently, the department has not formally recognized any qualifying local programs that would substitute for all or part of construction stormwater permit requirement. However, effective construction site erosion control programs have been developed on the local level.

The permit does contain conditions that may be used to coordinate the requirements of this permit with local programs. The permit provides for the use of application forms other than ones provided by the state so as long as they contain the information specified in the permit. The permit also provides for any applicable portions of plans developed under other regulatory programs to be incorporated into the SWPP plan required by this permit.

Expiration Date

The proposed expiration date for this permit is September 30, 2014. In the event that this permit is not finalized until a substantial time beyond the expiration of the current permit (September 30, 2009), the expiration may be adjusted to a date of approximately, but not to exceed, five years from the date of issuance.

Public Notification

The department proposes to publish a 30-day notice of the proposed renewal of this general permit in the Bismarck Tribune, the official newspaper of the capital city and in the newspapers of several other larger cities located regionally throughout the state. The notice will also be mailed to the department's public notice mailing list. Should there be adequate interest a public hearing will be scheduled.

8/14/2009

Addendum

Stormwater Discharges from Construction Activity North Dakota General Permit No. NDR10-0000

2009 Reissuance Response to Comments

1. *Comment: We feel the existing small construction activity coverage procedure fully accomplishes the goal of the general permit requirements of limiting the discharge of pollutants into the State's waters. The proposed changes will only increase the amount of paperwork for both the State's contractors and the ND Department of Health. The cost increases come from contractors having to file individual notice of intents and SWPPs [stormwater pollution prevention plans] for every project larger than one (1) acre just as now required for a large construction site. Additionally contractors will have increased cost in performing and recording stormwater inspections. At times these projects are quite a distance from the contractor's base of operations thus requiring significant travel costs and use of resources already in short supply. These resources include personnel and energy.*

Response: The department does not feel the proposed permit will significantly increase the amount of paperwork for contractors in the state. Part I.D.2.a requires that the owner or the owner and the operator, if known, to submit the application. The department acknowledges there will be an increase in the number of applications that will be filed and processed.

The requirement to develop and implement a stormwater pollution prevention (SWPP) plan for all projects covered by this permit has not changed from the previous permit. In addition the requirements for submitting a SWPP plan to the department (Part I.D.2.d) have not changed.

The requirement to perform and record inspections for all projects covered by this permit (Part III.A) is similar to the previous permit; inspections of areas that meet the condition of final stabilization were allowed to be suspended. The department allows inspections to be reduced on a case-by-case basis. The department also allows permittees to submit an alternative inspection plan for long, narrow, linear construction projects and similar projects in remote areas where vehicle traffic is restricted or could compromise native vegetation or stabilization measures. In addition, stormwater inspections are a requirement of the 2008 National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Construction Activities.

2. *Comment: **Part I.D.3 – Application Process Related to Builders**
The changes in the CGP [construction general permit] regarding multiple site coverage for small construction projects seem reasonable, especially since a builder with projects in the same subdivision or common plan of development can still submit one application. We would like to have the term "development" clarified within the CGP – does this relate to each phase of the development or the development as a whole? Can separate phases be added over time? Do we just amend the SWPP [stormwater pollution prevention plan]?*

Response: The language in Part I.D.3 was changed to provide clarification regarding the application process for residential construction. Part I.D.3 read:

- “3. For residential construction activity occurring within a development or subdivision subject to the permit requirements, coverage may be obtained by the following...

In addition, a SWPP plan must be developed and implemented for the permittee's activities within the development or subdivision.

Part I.D.3 now reads:

- “3. For residential construction activity occurring within a common plan of development (such as a subdivision) subject to the permit requirements, coverage may be obtained by the following...

In addition, a SWPP plan must be developed and implemented for the permittee's activities within a common plan of development. Additional phases of the common plan may be included under the initial application and permit coverage, provided the SWPP plan is amended to include the additional area or phases.

3. *Comment: **Part I.E.2.c – Notice of Terminations for residential builders***
The option to modify the SWPP instead of filing an NOT after each lot is finished is a reasonable alternative. However, this section needs some clarity in terms of the exact action that must be taken in the SWPP. How do you define “stabilization,” and when is stabilization completed?

Response: The language in Part I.E.2.c was changed from “...an NOT is not required for each lot that is sold or stabilized...” to “a NOT is not required for each lot that is sold or has achieved final stabilization...”

4. *Comment: **Part I.F.2 – Transfers involving permittees such as builders and developers***
In the land development phase the developer should be able to obtain a permit for the subdivision. Transfer of permit obligations is critical but 7 days is a short period of time. The North Dakota Association of Builders (NDAB) suggests that at least 14 days should be provided to get all the paperwork submitted to NDDoH.

Response: The submittal deadline provided in Part I.F.1 and 2 was increased from 7 days to 14 days.

5. *Comment: In section II.C.1.g, the Stormwater Pollution Prevention (SWPP) plan contents now include conditions related to TMDL and impaired waters. It is important to note the website provided in the draft permit is incorrect. NDDoH should make sure the correct website is provided in the final permit along with clear instructions on the actions a permittee has to take to ensure the permit obligations are met. Currently, the steps a permit holder has to take to be in compliance with the TMDL and permit is not clear.*

Response: In Part I.D.2.d and Part II.C.1.g, the website provided in the draft permit led to the publications page of the Surface Water Quality Management Program of the Division of Water Quality (www.ndhealth.gov/WQ/SW/A_Publications.htm). Since the 303(d) list and 305(b) report are now integrated, the most recent 303(d) list would have been found under

the heading Integrated Reports at the link [Final 2008 Integrated Report in PDF](#). To provide a more useful link, the web address will be changed from:

www.ndhealth.gov/WQ/SW/A_Publications.htm

to:

www.ndhealth.gov/WQ/SW/Z2_TMDL/Integrated_Reports/B_Integrated_Reports.htm

Part I.D.2.d and Part II.C.1.g was be changed from “The Department’s 303(d) list may be found at the following website under Integrated Reports...” to “The Department’s 303(d) list may be found at the following website in the most recent Integrated Report...”

6. *Comment: Due to the complications that may arise from translating TMDL requirements into NPDES Stormwater permits, EPA aimed to provide guidance through a Memorandum issued in November 2002 [<http://www.epa.gov/npdes/pubs/final-wwtmdl.pdf>]. This Memorandum makes policy recommendations such as the fact that implementation of Best Management Practices on a site can be used to meet the TMDL requirements. It will be helpful if NDDoH remains consistent with EPA guidance as outlined in the memo and state that implementation of BMPs and compliance with the NPDES permit means the necessary measures to meet the TMDL have been taken. Otherwise, each TMDL with varying load allocation for different pollutants will create a challenge for permittees because TMDL’s rarely provide the ways to meet numeric load allocation and meeting limits on different construction sites is not feasible.*

Response: The language in Part II.C.3.f read:

“For projects that discharge to waters that have a TMDL allocation for sediment and/or parameters associated with sediment transport (i.e., total suspended solids, turbidity), the plan must be consistent with the assumptions, allocations and requirements of the approved TMDL. If a specific numeric wasteload allocation (WLA) has been established that would apply to the project’s discharges, then the WLA must be incorporated into the plan and the necessary steps must be taken to meet the WLA. Information about the TMDL allocations may be found at the following website:
www.ndhealth.gov/WQ/SW/Z2_TMDL/default.htm.”

The language in Part II.C.3.f now reads:

“For projects that discharge to waters that have a TMDL allocation for sediment, total suspended solids, and/or turbidity, the plan must be consistent with the assumptions, allocations and requirements of the approved TMDL. If a TMDL specifies certain BMPs or controls to meet a wasteload allocation (WLA) applicable to the project’s discharges, then the BMPs or controls must be incorporated into the plan to meet the WLA. Information about TMDL allocations may be found at the following website:
www.ndhealth.gov/WQ/SW/Z2_TMDL/default.htm.”

7. *Comment: Section II.1.g, states that a TMDL created for sediment ‘..or parameters associated with sediment transport...’ require identification in the SWPP. It is not clear, however, the extent of the parameters that a builder will be responsible for identifying. In this case, it is advised that only TMDL created for sediment should be identified in SWPP.*

Response: References within the permit to ‘...parameters associated with sediment transport...’ have been changed to ‘...suspended solids and turbidity...’

8. *Comment:* Section II.2.g.2 refer to a requirement to use ‘energy dissipation measures’ to adequately protect the outlet from erosion. Energy dissipation measures should be optional as necessary by the conditions on the site. By providing energy dissipation measures as an option it will be used on sites where it is necessary avoiding its use in cases where it is not needed.

Response: The language in Part II.C.2.g.2 was changed from “The permittee(s) must operate the discharge to minimize the release of sediment and provide energy dissipation measures to adequately protect the outlet from erosion....” to “The permittee(s) must operate the discharge to minimize the release of sediment and provide adequate BMPs where necessary to minimize erosion due to the discharge....”

9. *Comment:* Section II.4. refers to a ‘long term operator’ but a definition is not provided. Refer to comments on post construction control below. NDAB suggests that this section should be removed because post construction should be managed through the MS4 stormwater program. The draft permit addresses active construction and should not be confused with post construction requirements.

Comment on Post Construction Stormwater Management - Appendix 2 of the permit.

Post construction controls regulate conditions after the construction activity has ceased. This form of regulation is inappropriate for regulation under the CGP. The focus of NPDES permit requirements is for active construction. Once construction has been completed, stabilization has occurred and a Notice of Termination has been filed this permit does not apply. By regulating post construction impacts in the CGP program, NDDoH is going beyond the intent and purpose of the permit which is regulating discharge associated with the operation of construction activity.

The MS4 permit program is an appropriate place to regulate post construction controls. MS4 programs under the Phase II program have already developed post construction controls and it is unnecessary to create duplication via the CGP. NDAB suggests removal of post construction flow controls from the draft CGP. If however, NDDoH decides to retain the post construction language there must be a grandfathering provision included in the final CGP to address projects already under construction and those that have already been designed and received approval for development.

In the EPA Construction Permit [http://www.epa.gov/npdes/pubs/cgp2008_finalpermit.pdf] and in the proposed Effluent Limitation Guidelines [<http://www.epa.gov/guide/construction/>] EPA noted the responsibility and authority of local government over land use planning to manage local resources as one of the reasons that it was not appropriate to regulate post-construction flows as part of EPA’s construction program. NDDoH should allow the local government authorities to manage post construction flow. NDAB recommends removal of appendix 2 from the permit and suggests that the department work with local authorities on post construction control management.

Response: The post-construction control guidelines in Appendix 2 of the proposed construction general permit (CGP) were the same as the post-construction control

guidelines found in Appendix 1 of the municipal separate storm sewer system (MS4) general permit, NDR04-0000 – effective date July 1, 2009. Minimum control measure number 5 requires MS4 permittees to develop, implement and enforce a program to address the quality of stormwater runoff from new development and redevelopment projects.

Since it is up to the MS4 permittee to decide which post-construction controls are appropriate for their program, the department removed Appendix 2 from the CGP. Instead, the department will develop a guidance document for post-construction controls for CGP permittees located outside the jurisdiction of a MS4 permittee.

As a result, Part II.C.4 was changed from:

“Stormwater Management. The plan shall include a description of permanent practices that will be installed during the construction process to control pollutants in stormwater discharges occurring after construction operations have been completed. Such practices may include:

- a. Stormwater ponds; flow reduction by use of open vegetated swales and natural depressions; infiltration of runoff on-site; and sequential systems which combine several practices. Guidance for pollutant reduction from post-construction stormwater management in new development or redevelopment areas is provided in Appendix 2.
- b. Velocity / energy dissipation devices must be placed at discharge locations. Appropriate erosion protection must be provided for outfall channels and ditches.
- c. Under this permit, permittees are responsible for maintaining on-site stormwater management features prior to final stabilization and acceptance by the long term operator. The plan should indicate who will provide long term maintenance of the stormwater management features. For stormwater management features that may discharge pollutants from point sources such as industrial sites a separate NDPDES permit may be required.
- d. When post-construction stormwater management for the site will be provided by a regional system, identify the system and operator in the plan. If the post-construction stormwater management guidelines in Appendix 2 cannot be provided on-site or by a regional system, the plan must include an explanation of the stormwater controls that will be implemented.

To:

“Stormwater Management. The plan must identify permanent practices incorporated into the project to control pollutants in stormwater discharges occurring after construction operations have been completed.

- a. Identify stormwater ponds; flow reduction by use of open vegetated swales and natural depressions; infiltration of runoff on-site; and sequential systems which combine several practices.
- b. Identify velocity / energy dissipation devices placed at discharge locations and appropriate erosion protection for outfall channels and ditches.

- c. Maintenance for on-site stormwater management features is the responsibility of the permittee until the NOT is submitted or the feature is accepted by the party responsible for long term maintenance.
- d. The design, installation and use of stormwater management features must comply with applicable local, state or federal requirements.

10. *Comment: **Local Requirements and Qualifying Local Programs***

NDDoH should take the next step in recognizing Qualifying Local Programs (QLP) within the CGP. By not recognizing QLPs, NDDoH is losing an opportunity to minimize duplicative requirements at the state and local level. NDDoH should review small MS4 construction programs and recognize them as QLP. The Local Qualifying Program should be indicated in the NOI and an applicant that submits to a Local Qualifying Program should not have to duplicate those requirements through the CGP permit. Consistency with local permits will make implementation and compliance with the permit easier, and training may be needed for smaller cities around the state.

Response: The department provided EPA with draft language to include in the permit regarding Qualifying Local Programs. The QLP language was removed from consideration when EPA objected to the scope of applicability proposed by the department. In comments to the department on the proposed QLP language, EPA stated that the NOIs for large construction activity must be made to the department even if the local program is designated a QLP. Should the conditions or restrictions for QLPs change, the department could modify the permit if necessary to incorporate QLPs.

11. *Comment: Have you established criteria or guidance for qualifying local programs?*

Response: We have not established criteria for Qualifying Local Programs (QLPs). Any recognition of a QLP would have to meet the criteria outlined in 40 CFR 122.44(s). See previous response in regards to allowing qualifying local programs.

12. *Comment: Please provide clarification in the NDPDES NDR10-0000 final permit for the following:*

- *An exemption for oil and gas exploration, production, processing, and treatment operations or transmission facilities associated with small construction activity (less than 5 acres) from permit authorization.*
- *An exemption for construction activities not required to obtain permit authorization and prepare and implement a storm water pollution prevention plan (SWPPP) from the requirements to notify and submit a SWPPP to the Water Quality Division when the construction activity will be within 2,000 feet of an impaired stream for sediment.*
- *A statement allowing for oil and gas field wide permits.*

Response: The following was added to the construction general permit as Part I.D.4:

“For oil and gas exploration, production, processing, and treatment operations or transmission facilities, permit coverage is not required for small construction activity. For

oil and gas related large construction activity permit applications may be submitted for individual project sites or for an area of operations such as a well field area.

To obtain permit coverage for an area of operations, the application must include a map outlining the area or a list of counties encompassing the area. Also include a copy of the SWPP plan or similar BMP document developed for construction related activities within the coverage area. The information for individual project sites and future sites within the coverage area including those meeting the criteria in Part I.D.2.d does not need to be submitted.

13. *Comment: Historically, North Dakota has not required the oil and gas industry to file a Notice of Intent and prepare Storm Water Pollution Prevention Plans for oil & gas small construction activities. If this is to remain the case, we request a statement be added within the general permit document exempting Oil & Gas Small Construction Activities from permitting and preparing Storm Water Pollution Prevention Plans....*

Response: Refer to the previous response.

14. *Comment: ...we respectfully request the storm water permitting exemption be applied to large construction projects.*

If the intention of the new rule is to require permitting of oil and gas construction projects, we request you reconsider the change in policy for the following reasons:

- *The EPA does not require permitting of oil & gas construction projects, large or small, unless the storm water discharges contribute to a violation of a water quality standard, or results in a discharge of reportable quantity pursuant to 40 CFR 110.6, 117.2, or 302.6.*
- *Industry employs common best management practices (BMP) on all of its construction sites regardless of the need for SWPPP permitting. These practices reduce or eliminate storm water releases.*
- *Most oil and gas construction projects are remote and have little ability to have an impact on surface waters.*
- *Many of the construction sites are located on agricultural lands and continue to be surrounded by agricultural lands. With the previously stated BMPs, these facilities have little ability to impact surface waters.*

Response: The Department intends to continue requesting stormwater permit coverage for large construction activity for oil & gas related facilities. EPA has provided information on its website regarding the National Pollutant Discharge Elimination System (NPDES) permitting requirements for oil and gas related construction activities¹.

The information states that the June 2006 rule which exempted NPDES permitting requirements for oil and gas related construction activities was vacated in November of 2008. With this vacature, the permitting requirements were reverted back to the requirements in place prior to the 2006 rule. After reviewing the information provided by the

¹ <http://cfpub.epa.gov/npdes/stormwater/oilgas.cfm>

EPA along with the 2005 and 2009 revisions to 40 CFR 122.26², the department believes that the stormwater permitting requirements apply to oil and gas related large construction activity. The general permit was revised to include language allowing additional flexibility for oil & gas related construction as described in the previous response.

² <http://www.gpoaccess.gov/cfr/index.html>